No. 77-938

In the Supreme Court of the United States

OCTOBER TERM, 1977

DONALD J. ANGELINI, DOMINIC CORTINA, JOSEPH SPADAVECCHIO, SALVATORE J. MOLOSE, NICK CAMILLO, JOHN LA PLACA and FRANK AURELI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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December 30, 1977

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Petitioners, Defendants-Appellees in the Court below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The opinion of the Seventh Circuit is printed in Appendix 1. The trial judge did not issue a written opinion, but he issued oral opinions containing findings of fact and conclusions of law on three separate dates, during the hearings held in this case. The transcripts of these oral opinions are printed in Appendix 2.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Seventh Circuit were entered on November 7, 1977. A timely petition for rehearing was denied on November 30, 1977 and the judgment became final on that date. The Court's judgment of November 7, 1977 and its order of November 30, 1977 are printed in Appendices 3 and 4.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

What are the standards for compliance with the immediate sealing requirement in 18 U.S.C. §2518(8)(a), relating to electronic surveillance, and what is the appropriate sanction for failure to comply with this provision?

RELEVANT STATUTORY PROVISIONS

18 U.S.C. §2518(8)(a) provides:

"(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections

(1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517."

18 U.S.C. §2518(10)(a) provides in part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval."

STATEMENT OF THE CASE

Petitioners were charged in a three-count indictment with conducting an illegal gambling business in violation of 18 U.S.C. §1955, conducting the alleged gambling business through the collection of unlawful debts in violation of §1962(c), and conspiring to violate §1962(c) in violation of §1962(d).

On September 16, 1976, petitioners filed a motion to suppress tapes from three court-authorized wiretaps on the ground that the government had failed to comply with the statutory requirement that "immediately" upon expiration of the orders authorized in the wiretaps, the tapes be made available to and sealed under the direction of a district judge.

After extensive evidentiary hearings and rehearings, the Trial Judge found that the tapes were not sealed immediately, that the government had failed to provide a satisfactory explanation for the delay in sealing, and that he was not satisfied that there had been no alteration of the tapes in this case in light of the fact that the government had admittedly used the original tapes after they were required to be sealed. The Court ordered the contents of the tapes suppressed, and the government appealed from that order. The Court of Appeals for the Seventh Circuit reversed.

It is undisputed that the tapes were not sealed immediately after expiration of the period of the wiretap order or termination of the wiretaps.[1]

In response to defendants' motion, the government asserted that there was a "satisfactory explanation" for its failure to comply with the sealing requirement. Government agents claimed that they had retained and used the original tapes after they were required to be sealed in order to assist in making transcripts, because in some instances they believed the originals might be clearer than the duplicate copies.

Extensive evidentiary hearings were held. At these hearings, the two FBI agents in charge of the three wire-

[1] There was a dispute as to whether the expiration date of each wiretap order or the date of final termination of the wiretap was the proper date to consider for purposes of the sealing requirement. The district judge stated, without deciding which was the proper date, that whichever date was used, the government had failed to comply with the command of §2518(8)(a) that the tapes be sealed immediately. (App. 2 at 15.) The Court of Appeals also declined to decide this question. (App. 1 at 3, n. 3.) See *United States* v. *Ricco,* 421 F. Supp. 401, 406-07 (S.D.N.Y. 1976). Depending upon the dates used, the delay in sealing was 9 or 14 days for the first wiretap, 26 or 43 days for the second wiretap, and 38 or 44 days for the third wiretap.

taps testified, and expert testimony was presented by both the government and the defense. Following these hearings, the judge granted the defendants' motion to suppress the tapes, holding that the excuse offered by the government for the delay was unsatisfactory under the facts of this case. The Trial Court denied a motion for reconsideration filed by the government, rejecting its argument that the sealing provision was a "technical requirement" and that in the absence of a showing of actual prejudice, the statutory requirements may be overlooked. The Trial Court found that there was no evidence of deliberate tampering with the tapes, but declined to enter the finding requested by the government that there had been no alteration of the tapes, stating that the request "asks me to reach a finding, which I could not reach on the basis of the evidence before me, because I am not so satisfied." (App. 2 at 20-21; 19.)

The Seventh Circuit indicated that the present case was a close one, because alternatives were available to the government which might have allowed immediate sealing and yet preserved first quality tapes for transcription purposes. (App. 1 at 7.) However, the Court held that the government's explanation, in the circumstances, was satisfactory,[2] and that there was no evidence that the integrity of the tapes had been compromised. Noting the difference between its view and the view of the Second Circuit expressed in *United States* v. *Gigante,* 538 F.2d 502, 505-07 (1976), the Seventh Circuit stated that the suppression standards under 18 U.S.C. §2518(10)(a) were applicable to the sealing requirement rather than the independent suppression provisions of §2518(8)(a). (App. 1 at 8, n.7.)

[2] The Court did not analyze the differing factual situations of the three separate wiretaps.

REASONS FOR GRANTING THE WRIT

THERE IS A DIRECT CONFLICT AMONG THE CIRCUITS ON THE MEANING OF THE IMMEDIATE SEALING REQUIREMENT OF §2518(8)(a) AND THE SANCTION TO BE IMPOSED FOR FAILURE TO COMPLY WITH THE STATUTORY PROVISION. THESE ARE QUESTIONS OF GREAT IMPORTANCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE WHICH SHOULD BE RESOLVED BY THIS COURT.

A.

The Holdings Of The Circuit Courts Of Appeals Are In Conflict.

Introduction

The decision of the Seventh Circuit in this case is in direct conflict with the ruling of the Second Circuit in *United States* v. *Gigante,* 528 F.2d 502, 505-07 (1976). Other Courts of Appeals and District Courts have also issued differing opinions relating to the proper interpretation of §2518(8)(a).

This case involves one of the most sensitive and important issues in the administration of criminal justice in our society—the Court-sanctioned use of electronic surveillance devices to monitor the private telephone conversations of American citizens. As the Trial Judge stated:

> "There is, in our society, a long held belief that wiretapping is a very suspect kind of activity. It was either Justice Holmes or Justice Brandeis who referred to it, in the famous dissent, as a dirty business."[3] (App. 2 at 11.)

[3] *Olmstead* v. *United States,* 277 U.S. 438, 470 (1928), Justice Holmes dissenting; see also dissent of Justice Brandeis in the same case, 277 U.S. at 471-85.

Since the *Olmstead* opinion in 1928, this Court has repeatedly indicated its agreement with the basic principle which Justice Holmes expressed. See, *e.g., Nardone* v. *United States,* 302 U.S. 379, 384 (1937), and 308 U.S. 338, 340 (1939); *Berger* v. *United States,* 388 U.S. 41, 45-49, 62-63 (1967); *United States* v. *Giordano,* 416 U.S. 505, 514-15 (1974).

The Second Circuit in *Gigante* and the Trial Judge in this case have adopted the view that when Congress decided that modern conditions required authorization of electronic surveillance in certain limited circumstances, subject to certain specified procedures and safeguards, it intended the limitations, procedures and safeguards to be strictly followed and enforced. The decision of the Seventh Circuit adopts the opposite view that the government may ignore the statutory limitations, procedures and safeguards, so long as the defendant cannot prove actual prejudice. The conflict which we ask this Court to resolve involves the interpretation of a statute which is inextricably intertwined with the Constitutional protection against unreasonable search and seizure and our long held repugnance to governmental invasions of privacy.

There are two major issues relating to the sealing provisions of §2518(8)(a) which should be addressed by this Court. The first concerns the meaning of the words "immediately" and "satisfactory explanation" within the context of §2518(8)(a), and the appropriate standards to be applied in determining whether these statutory requirements have been met. The second issue concerns the proper sanction to be applied in cases where there was neither immediate sealing nor a satisfactory explanation. In many of the cases, these two issues have become confused, making it difficult to discuss the issues separately, and pointing up the need for this Court to furnish direction and

resolve the important questions arising from this statutory provision.

Courts from the Second, Third, Fifth, Sixth and Seventh Circuits have attempted to interpret Congress' meaning in its call for "immediate" sealing or the furnishing of a satisfactory explanation for delay under §2518(8)(a).[4] The results have varied widely.

(1)

The Second Circuit

In *United States* v. *Gigante,* 538 F.2d 502, 505-07 (2nd Cir. 1976), the Second Circuit held that the government's failure to satisfactorily explain its violation of the sealing requirements of §2518(8)(a) required suppression of the tapes without regard to any showing that the tapes were or might have been altered during the delay. In that case the government had offered no explanation for the delays in sealing.

The *Gigante* Court held that the requirement of a seal "provided for by this subsection" means a seal obtained in conformity with the provisions of §2518(8)(a), and that the plain language of this subsection prohibits use or disclosure of the contents of tapes which are not so sealed. In language closely paralleled by the opinion of the Trial Court in the present case, the *Gigante* Court stated that in enacting Title III's detailed restrictions on electronic surveillance, Congress intended to insure careful judicial

[4] There are also District Court cases which have not reached the appellate level, and a number of state cases in which courts have attempted to interpret statutes similar to the federal statute. See, *e.g., United States* v. *Ricco,* 421 F. Supp. 401, 406-07 (S.D. N.Y. 1976); *People* v. *Sher,* 381 N.Y.S.2d 843, 846 (1976); *People* v. *Nicoletti,* 356 N.Y.S.2d 855, 857-58 (1974).

scrutiny throughout the entire process of intercepting and utilizing wiretap evidence:

> "The immediate sealing and storage of recordings of intercepted conversations, under the supervision of a judge, is an integral part of the statutory scheme. . . . Maintenance of the integrity of such evidence is part and parcel of the Congressional plan to 'limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.' *U.S.* v. *Giordano,* 416 U.S. 505, 527 (1974). Moreover, it plays a 'central role in the statutory scheme.' *Id.* at 528. *See also U.S.* v. *Chavez,* 416 U.S. 562 (1974)." (538 F.2d at 505.)

Noting that tape recorded evidence is "uniquely susceptible to manipulation and alteration" which can be very difficult to detect, the Court held that to require a defendant to show that the integrity of the tapes had been compromised would vitiate the Congressional purpose in requiring judicial supervision of sealing. As did the Trial Court in the present case, the Court in *Gigante* indicated that the purpose of the sealing requirement is negated if suppression is required only where the defendant can affirmatively demonstrate alteration of the tapes.

In *Alfano* v. *United States,* 555 F.2d 1128, 1129-30 (2nd Cir. 1977), a post-conviction case, the Second Circuit reaffirmed its holding in *Gigante,* although it denied relief, stating that a different standard exists for post-conviction proceedings, where evidence of actual tampering is required. But the Court stated:

> "Our decision today does not disturb in any way the prophylactic rule we laid down in *Gigante.* That case requires suppression of wiretap tapes not immediately sealed in accordance with 18 U.S.C. §2518(8)(a), without inquiry into whether the tapes have been altered. We hold only that, where extraordinary relief by writ

of *habeas corpus* is sought, evidence of actual tampering is necessary." (555 F.2d at 1129-30, n. 2.)

The Second Circuit has not extensively analyzed the question of what constitutes a "satisfactory explanation" for a delay in sealing. In an earlier case, *United States* v. *Poeta*, 455 F.2d 117, 122 (2nd Cir. 1972), *cert. denied* 406 U.S. 948 (1972), the Second Circuit considered the explanation offered for a 13-day delay in sealing. At the time of the expiration of the wiretap order, the issuing justice was on vacation. After a 13-day wait, the recordings were brought to another judge, who directed that they be sealed. The Court found that the delay in sealing was excusable because of the wording of the New York statute, and the fact that it was the New York police who took the tapes before the judge to be sealed. The police were under the impression that only the issuing justice (as prescribed by New York law) could direct the sealing.[5] The Court also pointed out that there had been no claim that the tapes were altered or that the defendants were in any way prejudiced by the delay.

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[5] See *United States* v. *Fury*, 554 F.2d 522, 533 (2d Cir. 1977), in which the Court, applying the New York statute, held that a 6-day delay in sealing was satisfactorily explained because of the wording of the New York law. In two Southern District of New York cases involving the New York wiretap statute, in which the sealing provision is very similar to the federal statute, the Courts reached differing results. *Compare United States* v. *Ricco*, 421 F. Supp. 401, 406-07 (S.D.N.Y. 1976), (where the Court suppressed tapes because of a 12 or 13 day delay in sealing when the government claimed it was using the tapes for transcription purposes) *with United States* v. *Caruso*, 415 F. Supp. 847, 850-51 (S.D.N.Y. 1976), *aff'd. without opinion* 553 F.2d 94 (2d Cir. 1977), (where the Court found delays of 24 and 42 days satisfactorily explained by a series of events).

(2)

The Third Circuit

The Third Circuit's view of the sealing requirements under the wiretap statute is directly contrary to that of the Second Circuit. In *United States* v. *Falcone*, 505 F.2d 478, 483-84 (3rd Cir. 1974), *cert. denied* 420 U.S. 955, the Court found that there was "no doubt" that the tapes were not sealed in accordance with the statute, but said that it did not follow that the evidence obtained must be suppressed. The Court said that administrative delay might be a satisfactory explanation in that case, but the crucial factor was the integrity of the tapes themselves. The Court noted that after an extensive pre-trial hearing and evidence at trial, the Court below made a specific finding of fact that the tapes had not been tampered with, and stated:

> "Therefore, all we hold is that where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom." (505 F.2d at 484.)

In *Gigante*, the Second Circuit rejected the reasoning of the *Falcone* Court, pointing out that it "focused primarily on the suppression provisions of §2518(10)(a) and paid scant attention to the independent prerequisites for admissibility delineated in §2518(8)(a)."[6]

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[6] The Seventh Circuit specifically rejected the *Gigante* reasoning on this point, claiming that "the *Gigante* rule inexplicably elevates the immediate sealing requirement to a more protected status than any of the other procedural requirements enacted in Title III." (App. 1 at 8, n. 7.)

(3)

The Fifth and Sixth Circuits

The Fifth Circuit, in three decisions which are essentially devoid of legal analysis, appears to have adopted the Third Circuit's view that violation of the sealing requirement does not require suppression in the absence of a showing of alteration of the tapes. *United States* v. *Diadone,* 558 F.2d 775, 780 (5th Cir. 1977); *United States* v. *Cohen,* 530 F.2d 43, 46 (5th Cir. 1976), *cert. denied; United States* v. *Sklaroff,* 506 F.2d 837, 840 (5th Cir. 1975), *cert. denied* 423 U.S. 847.

The Sixth Circuit, on the other hand, appears to have adopted the view of the Second, but again without legal analysis on this issue. See *United States* v. *Lucido,* 517 F.2d 1, 2-3 (6th Cir. 1975), affirming a judgment of acquittal where the Trial Court sustained a defense objection to admission of tape recordings for failure to comply with the sealing requirements of §2518(8)(a) despite the government's claim that it could establish that the tapes had been protected from editing or alteration.

(4)

The Seventh Circuit

In the present case, the Seventh Circuit followed the reasoning of its earlier opinion in *United States* v. *Lawson,* 545 F.2d 557, 564 (7th Cir. 1975), *cert. denied,* 424 U.S. 927, and adopted a standard substantially similar to that of the Third Circuit in *Falcone* for determining whether violation of the sealing requirement justifies suppression of the tapes.

In the present case, the Seventh Circuit considered the question of what constitutes a "satisfactory explanation,"

which the Court described as a phrase surrounded by "murkiness." (App. 1 at 7.) Without purporting to offer an absolute definition appropriate to all cases, the Court stated that generally,

> "a satisfactory explanation is one in which the Government shows that it acted with dispatch and all reasonable diligence to meet the sealing requirement, respectful of the letter and spirit of Title III and mindful of the construction it has been given in the courts." (App. 1 at 6.)

The Seventh Circuit did not, however, apply its own definition to the present case when it overturned the District Judge's suppression order entered after lengthy evidentiary hearings.

Far from demonstrating that the government acted with "reasonable diligence," "respectful of the letter and spirit of Title III," the undisputed evidence here showed that there were alternatives available which would have allowed immediate sealing and yet preserved a first-quality tape for clarifying the inaudible portions. The Court of Appeals itself acknowledged that the evidence showed the government could have made duplicate original tapes or used filtering equipment to produce a good copy, and stated that for that reason this was a "close case." In the course of the evidentiary hearings, the FBI agents admitted that they were aware of these alternatives and that the FBI possessed the machines needed to employ them. (Tr. 10/29/76 at 36-40). We respectfully submit that ignoring these obvious and readily available alternatives in violation of the statute over a period of almost two months does not show "reasonable diligence" or "respect for the letter and spirit of Title III."

Moreover, the Court did not consider the significantly different factual circumstances of the three separate wiretaps in this case. It did not distinguish between the situa-

tion in the first wiretap and that in the second and third wiretaps, where the delays were considerably longer, the originals used even less frequently,[7] and the government was more fully aware of its transcription problem and possible alternatives which would not have required a delay in sealing. Further, the Seventh Circuit did not comment on the fact that there was more than a month's delay in the sealing of both the second and third wiretaps beyond the period for which the government offered *any* excuse. (See Tr. 10/29/76 at 9, 15; 77-78.)

B.

This Court Should Reverse The Seventh Circuit In This Case And Resolve The Important Issues Arising Under §2518(8)(a).

For the reasons discussed above, this Court should reverse the opinion of the Seventh Circuit in this case and reinstate the holding of the District Judge suppressing the tapes.

The District Judge's decision was made after lengthy evidentiary hearings at which the Judge had the opportunity to observe the demeanor of the witnesses and hear their testimony firsthand. The District Judge's ruling was a careful and considered one, as shown by his oral opinions, printed in Appendix 2, which petitioners strongly urge this Court to read.

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[7] The agents testified that they used the original tapes from the first wiretap a total of 10 to 15 times, causing a delay in sealing of 9 or 14 days, depending on the determination of the correct date to be used for sealing purposes; original tapes from the second and third wiretaps *combined* were referred to a total of 7 to 10 times, causing delays in sealing of 26 or 43 days for the second wiretap, and 38 or 44 days for the third wiretap.

The Seventh Circuit's finding that the government furnished a "satisfactory explanation" for the delay in sealing is contrary to the evidence and contrary to the Court's own proffered definition of that phrase. Not only was the explanation furnished by the government unsatisfactory for the portion of the delay which it covered, but, based on the testimony at the hearings relating to the length of the transcription periods, there were delays of 4 to 7 days on the first wiretap and of more than a month each on the second and third wiretaps *beyond* the periods for which the government offered any excuse whatsoever.[8]

This Court should also reverse the Seventh Circuit's ruling that suppression is required only when there is a showing of alteration or actual prejudice to a defendant. The Court completely disregarded the plain language of §2518(8)(a). Congress provided that the sealing was to be immediate, unless a satisfactory explanation were furnished; it did not mention or intimate any requirement of alteration or prejudice. As the trial judge stated, where actual alteration and prejudice are shown, the tapes should be suppressed in any event, without regard to the sealing requirement. (App. 2 at 17.) Thus, the Seventh Circuit's ruling reads the "satisfactory explanation" provision and the immediate sealing provision out of the statute.

Because of the considerable confusion engendered by the words "immediate" and "satisfactory explanation" in §2518(8)(a), and because of the difference among the Circuits in the sanctions imposed for failure to comply with the sealing provisions of §2518(8)(a), this Court should grant certiorari to resolve these important questions and give direction to the Circuit Courts of Appeal.

The present case, because of the Seventh Circuit's separate analysis of the questions relating to standards for de-

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[8] See page 14, *supra*.

termining whether a "satisfactory explanation" has been furnished, and of the proper sanctions for failure to comply with the sealing dictates of §2518(8)(a), presents a particularly appropriate case for this Court's consideration of the important issues arising from §2518(8)(a).

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court grant a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

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December 30, 1977

APPENDIX

APPENDIX 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1152

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

DONALD J. ANGELINI, DOMINIC CORTINA, JOSEPH SPADAVECCHIO, SALVATORE J. MOLOSE, NICK CAMILLO, JOHN LA PLACA and FRANK AURELI,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-CR-169—John F. Grady, *Judge*

Argued September 16, 1977—Decided November 7, 1977

Before PELL, BAUER, and WOOD, *Circuit Judges.*

PELL, *Circuit Judge.* This case involves Government interceptions of wire communications without achieving strict compliance with the federal statutes governing such

interceptions,[1] with the court being called upon to determine whether to apply the severe remedy of suppressing the resulting tapes and derivative evidence. The district court ordered suppression, and the Government appealed, pursuant to 18 U.S.C. § 2518(10)(b).

The pertinent facts are not complicated. During the period between November 1974 and February 1975, the Goverment obtained three separate wiretap orders as part of its investigation into illegal gambling operations. The adequacy of these orders and the propriety of the procedures used to obtain them are not in issue here, nor is there any question before us about the scope or manner of the actual interceptions. The product of these interceptions, pursuant to 18 U.S.C. § 2518(8)(a),[2] was a substantial quantity of tape recordings of the intercepted telephone calls. Although § 2518(8)(a) calls for such recordings to be sealed by the district judge "immediately" upon the expiration of the authorization order, this was not done here. Instead, the tapes resulting from the three authorization orders were sealed 9, 38, and 26 days after the respective orders expired.[3]

The Government explained the delay in sealing as follows. After the tapes were made, the Federal Bureau of Investigation (FBI) made duplicate tapes, and the duplicate tapes were given to a full-time group of five or six typists for transcription. The originals were retained in secure storage, to which only the FBI special agent in charge had access. Because of the quantity of the tapes, the volume of intercepted calls on each, and the difficulty of transcribing sometimes garbled or inaudible recordings, it took several days to transcribe each tape. When transcripts were typed, they were returned to the special agent in charge with the tape copies. Where the typists were unable to understand the content of certain conversations, an agent attempted to do so with the duplicates, failing which reference to the original tapes was had. Reference to the originals was had between 17 and 25 times. The Government argued to the district court and argues here that it operated in perfect good faith to facilitate use of the tapes as legal evidence. Absent some harm to the defendants, the Government insists, the tapes should not be suppressed.

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[1] The provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, are summarized in *United States* v. *Lawson*, 545 F.2d 557 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976), and there is no reason to repeat that task here. Statutory provisions of particular relevance to this case will, of course, be discussed *infra*.

[2] Section 2518(8)(a) provides, in pertinent part:

> The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents . . . shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

[3] We find it unnecessary to decide whether the orders expired at the terminal dates indicated on their faces or on the dates on which interception under the orders was actually terminated (by which count the delays in sealing would be 14, 43, and 44 days respectively), for the legal issues presented are the same either way.

In an oral opinion, the district court judge stated:

> Now, I find as a fact that there was no tampering [with the tapes] whatsoever. I find as a fact that the Federal Bureau of Investigation and the attorneys for the Department of Justice acted in the best of faith and with the best of motives and I further find that none of them attempted to circumvent the law in any way and I further find that they believed that they were not circumventing the law and I think they still believe it, and they may be right; but it is my obligation to interpret and apply the law as I see it.

The district judge declined to enter a finding that there had been no inadvertent alterations of the tapes, reasoning that such alterations might have occurred as the tapes were used, and opining that avoiding the necessity of factual findings on the existence of such alterations was part of the reason for the immediate sealing rule. As the district judge viewed the case, the "satisfactory explanation" referred to in § 2518(8)(a) for the lack of a properly and promptly applied seal requires the Government to show that a sealing delay was "really necessary." Because the amount of the total tape transcripts which retention of the original tapes could have clarified was an "infinitesimal percentage" not likely to have much impact on the Government's need to prove at trial an ongoing gambling operation, this standard was not met. The district court judge determined that the lack of a satisfactory explanation, thus defined, required suppression without more.

In *United States* v. *Lawson, supra,* 545 F.2d at 564, this Court determined that the general suppression provision of Title III, 18 U.S.C. § 2518(10)(a), and particularly subsection (i) therein, governs post-interception compliance problems such as this one. *Lawson* states that the post-interception procedural requirements aim to "preserve the

integrity of the intercepted conversations and to prevent any tampering or editing of the tapes or other unlawful use." *Id.* They are sufficiently important to the Congressional purposes in enacting Title III that suppression is justified in appropriate cases. Cases appropriate for suppression are identified by considering "whether the purpose which the particular procedure was designed to accomplish has been satisfied in spite of the error;" "whether the statutory requirement was deliberately ignored; and, if so, whether there was any tactical advantage to be gained thereby." *Id.*

The *Lawson* approach, which sensibly reads § 2518(8)(a) in conjunction with § 2518(10)(a), necessarily contemplates a two-step analysis in considering delayed sealing problems. If sealing was not immediately accomplished, it must be decided whether a satisfactory explanation has been offered. If not, the inquiry described above is undertaken. Although we believe this to be a close case, we find that the district court should not have suppressed the evidence in this case, both because the Government's explanation is, in the circumstances of this case, satisfactory, and because the purposes intended by Congress were fulfilled despite the delay.

In considering the adequacy of the Government's explanation for the sealing delay, we point out first that this is not a case even remotely akin to *United States* v. *Gigante,* 538 F.2d 502 (2d Cir. 1976), where sealings were delayed for periods from over eight months to nearly thirteen months and the Government offered absolutely no explanation. Nor does this case resemble *Lawson, supra,* where the only explanation offered for a 57-day delay was the travel schedule of a single agent. Obviously, another agent could have taken charge of the sealing obligation there. Here, on the other hand, the Government was pursuing an unquestionably legitimate and important goal (transcription to facilitate the use of the tapes as evi-

dence[4]) in the best of faith, without any intention to circumvent the statute. Moreover, for all that appears, this task was undertaken with acceptable diligence, using a team of typists working full time. The original tapes were kept secure, no one tampered with them, and they were used for clarification only sparingly, as a last resort. No argument is made that the defendants were prejudiced in any way by the delay itself. *See United States* v. *Diadone*, 558 F.2d 775, 780 (5th Cir. 1977).

On the surface, at least, it would appear that all of this would amount to a satisfactory explanation. The legislative history of Title III provides virtually no guidance as to what constitutes a "satisfactory explanation." and, even now, there is a scantling of judicial opinions dealing squarely with the question. Without purporting to adopt a definition that will be appropriate for all cases, because each case must be decided on its own facts, we think it fair to say generally that a satisfactory explanation is one in which the Government shows that it acted with dispatch and all reasonable diligence to meet the sealing requirement, respectful of the letter and spirit of Title III and mindful of the constructions it has been given in the courts.

Examination of two such constructions indicates that the explanation given here is satisfactory. In *United States* v. *Sklaroff*, 506 F.2d 837 (5th Cir. 1975), *cert. denied*, 423 U.S. 874, the court approved a two-week delay explained only by accounting for the security of the tapes for seven days and asserting that seven more days were used in preparing search warrants, where there was no showing of prejudice or tape alteration. In *United States* v. *Caruso*, 415 F. Supp. 847, 850-51 (S.D.N.Y. 1976), *aff'd without opinion*, 553 F.2d 94 (2d Cir. 1977), the court found a satisfactory explanation for a 24-day delay in

[4] *See, e.g., United States* v. *Onori*, 535 F.2d 938, 947 (5th Cir. 1976).

efforts to duplicate the tapes and make them ready for sealing and in discussions in the prosecutor's office about the possibility of continuing the interception. A different 42-day delay was approved in *Caruso* on the basis of confusion resulting from information that a wiretap subject had received a tip-off, the hospitalization of the prosecutor in charge, and the time it took the newly assigned prosecutor to familiarize himself with the case. We do not cite either *Sklaroff* or *Caruso* as textbook cases of satisfactory explanations, for each case, as we have said, must be judged in the context of its own facts. But we do think that the explanation given here is at least as appealing as the ones approved in those cases.

The difficulty, from the Government's point of view, and the reason we consider the present case as a close one, is that there were available alternatives which might have allowed immediate sealing and yet preserved a first quality tape for clarifying the inaudible portions. The Government might have made duplicate original tapes, or could have used filtering equipment to produce a very good copy. In the future, the Government, it appears to us, would be well advised either to use such a method or forego the benefits of clarification from the original if such a course would require late sealing. Indeed, if *Lawson, supra* at 564, in which this court chastised the Government for its "unenthusiastic approach for the "technical' requirements" of Title III, had been decided prior to the incidents in issue here[5] we might well take a different view of this case. But in view of the murkiness that has surrounded the phrase "satisfactory explanation," the Government agents' testimony in this case that the equipment mentioned above was not readily accessible to them, the

[5] *Lawson* was not released as a published precedential opinion until December 3, 1976. The Government, however, received a copy of this court's unpublished order (*see* Circuit Rule 35) issued on August 20, 1975, as a party to the litigation.

diligence they used with that which they had, and the district court's finding that the agents acted in perfect good faith, we think the Government's explanation is, in the circumstances of the case, satisfactory.[6]

We also believe the Congressional purposes underlying the sealing requirement were met here despite the delay, for there is no substantial question raised about the integrity of the tapes. The district court's unchallenged finding was that there was "no tampering whatsoever." That conclusion goes a long way towards satisfying the *Lawson* inquiry referred to above. As we have noted, *Lawson* approved a refusal to suppress, even in the face of an inadequate explanation for a sealing delay longer than those before us here, because the integrity of the tapes was not challenged. *See also United States* v. *Diadone, supra; United States* v. *Sklaroff, supra; United States* v. *Falcone,* 505 F.2d 478 (3d Cir. 1974), *cert. denied,* 420 U.S. 955 (1975).[7]

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[6] We find unpersuasive the district court's reasoning that the small number of references made to the original tapes undercut the adequacy of the explanation, for the record gives us no reason to assume that the relatively light use of the tapes could have been predicted in advance.

[7] We are not unmindful that the Second Circuit in *United States* v. *Gigante, supra,* has read the pertinent statutes differently than we did in *Lawson.* That court has apparently chosen the position that the absence of an immediately applied seal or a satisfactory explanation therefor requires suppression without inquiry into the satisfaction of the Congressional purposes. We see no reason, nonetheless, to question the commitment this court made in *Lawson* to determining a violation on the basis of the satisfactory nature of explanation for delay and determining whether suppression is the appropriate remedy for the violation under the standards of 18 U.S.C. § 2518(10)(a). As the Government argued before us, the *Gigante* rule inexplicably elevates the immediate sealing requirement to a more protected status than any of the other procedural requirements enacted in Title III.

To be sure, the district court declined to find that there had been no accidental alterations in the original tapes, being of the view that the point of the sealing rule was to avoid the need to make such findings. Nor, consistently, did the district court find to the contrary.[8] The *Lawson* inquiry into the integrity of the late-sealed tapes, however, requires just such analysis. Defendants strenuously insist that the tapes were, after all, used, and they should not have to prove alterations. We may assume without deciding that it is not the defendants' burden to demonstrate affirmatively the existence of material alterations, *but see United States* v. *Diadone, supra* at 780; *United States* v. *Sklaroff, supra* at 840 (both cases referring to defendants' *failure to show* that tape integrity was violated), for whichever side has the burden of persuasion, the Government's proof persuades in this case.

Because of the unchallenged finding that no deliberate tampering whatsoever occurred, there is no issue here of attempting to discover cleverly made alterations. Defendants' tape recording expert suggested two possibilities of accidental alterations: accidental erasures, and accidental injury to the tapes by stretching, the latter being most likely to occur when a tape slips on its reels while the tape recorder is being switched back and forth between fast forward and rewind. However, never having used the type of machine used here by the Government, the expert was in no position to say whether either of these things could have happened here. The Government's expert, on the other hand, was quite familiar with the particular machine, and testified that it was equipped with anti-stretch devices which gently slowed to a stop the tape's progress in either a forward or backward direction before activating movement in the opposite direction. This eliminated the possibility of stretching. The expert had tried to make the machine stretch a tape without

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[8] Had it done so, of course, we would have a very different case.

success. Moreover, even the defense witness agreed that a stretching problem would be very easy to detect. With regard to accidental erasure, we note that in many tape machines, activating the recording (and thus the erasing) mode requires the simultaneous manipulation of two or more separate controls, and there was absolutely no evidence before the district court that accidental erasure was even possible on the machine and in the use to which the tapes were put. We also point out that undisputed evidence from the Governments' expert was that the activation of the erase mode on any recorder can be detected electronically. Also, of course, the very nature of an erasure is (absent tampering, as here) that a blank spot will remain quite apparent on the tape as it is played, which would, in conjunction with defense counsel's evaluation of the pertinence of a tape segment to the defense, eliminate the need to analyze huge amounts of tape.

What we are saying here, in part, is that there is ample authority and mandate in the law for the district judges to refuse to admit particular tapes or portions thereof where there appears a reasonable possibility that accidental alteration may have occurred that in any way prejudices the defense. The wholly speculative possibility, however, that readily detectable alterations might somehow have crept into these tapes does not pose such a question about the tapes' integrity as to justify suppressing the lot of them. We find significant in this respect the undisputed fact that the original tapes were used very little by the Government in the process of making the transcripts.

For the reasons set out herein, the district court's suppression order is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

ORAL OPINION OF JUDGE GRADY ON NOVEMBER 3, 1976 (Tr. 169-176)

The Court: Well, let me tell you how I understand this statute.

There is, in our society, a long-held belief that wiretapping is a very suspect kind of activity. It was either Justice Holmes or Justice Brandeis who referred to it, in the famous dissent, as a dirty business. That has been the philosophy of our law virtually since the ability to intercept electronic communications became a reality.

That reluctance to allow interception of private communications began at one point in the 1960s, in the view of Congress, to run counter to the need to protect society from certain kinds of criminal behavior, which are often conducted by the use of these very types of electronic communications.

Therefore, Congress enacted this legislation, which in my view sought to strike a balance between the traditional reluctance and refusal to authorize interception and the other goal of suppressing crime.

Now, this was a right that did not exist without reference to the statute that created it.

We do not have a case here where the law enforcement agencies already had the inherent power to intercept communications and Congress abridged that inherent power in some way, rather, we have a complete absence of such a power and the creation of it by the legislation that is involved in this case.

It is significant to me that the opening section of the legislation here is not an authorization of wiretapping;

it is, rather, a prohibition of the use of any wiretapping evidence that is attained in contravention of these specific provisions of this enabling legislation.

Section 2515 of Title 18, which is the opening section of the statute, says, quite clearly, that no court can receive any evidence that is obtained or otherwise handled in violation of this chapter. It talks about if the disclosure of that information would be in violation of this chapter.

Now, one of the things that the chapter provides is contained in a section that the defendants rely upon specifically here, Section 2518(8)(a), which provides that immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his direction.

I believe that this provision represented an effort on the part of Congress to make, more difficult than it would otherwise be, the tampering with, or alteration of any evidence of this kind.

I do not think that Congress was naive enough to think that immediate sealing would necessarily prevent tampering. There are just too many problems with that, among which is to determine when the tape was made, for one thing.

But I do think that Congress was not unrealistic in assuming that if immediate sealing were required, it would become more difficult to tamper, to alter or to change and, therefore, since they were creating a new investigative technique and were ambivalent about it, this seemed to the Congress one limitation that might well tend to prevent abuse.

Now, I think that is what that section means when, at a later point, it says, "That the presence of the seal

provided for by this subsection or a satisfactory explanation for the absence thereof shall be a prerequisite for the use or disclosure of the contents "of any wire or oral communication or evidence derived therefrom under subsection 3 of Section 2517."

Now, subsection 3 of Section 2517 is the section which authorizes the use in a court of information intercepted in accordance with the provisions of this statute.

So, Congress says, in so many words, in English prose, that is not subject to interpretation, that immediate sealing is a prerequisite for the use of this information in court.

Congress does not want the Court to conduct a factual hearing as to whether the delay did in fact result in tampering.

There are two sides to that question. One witness would say that there was tampering and another one would say there was not. It is a matter of expert opinion.

We have been through a recent era in our history where there was a trial before a Federal Judge in another district that had to do with whether certain tapes had been altered and the expert testimony on the matter was, as I read the newspapers at least, not unanimous by any means.

It is that type of inquiry that I think the Congress sought to foreclose and render unnecessary by providing, in very simple terms, the tapes should be immediately sealed and if they were not, they could not be used. That does not mean that you cannot have factual inquiries in regard to tampering even where the tapes are immediately sealed, and I'm sure that hearings of that kind will take place; but, considering the inherent infirmities of such an inquiry, Congress sought to limit their number.

Now, I find as a fact that there was no tampering whatsoever. I find as a fact that the Federal Bureau of In-

vestigation and the attorneys for the Department of Justice acted in the best of faith and with the best of motives and I further find that none of them attempted to circumvent the law in any way and I further find that they believed that they were not circumventing the law and I think they still believe it, and they may be right, but it is my obligation to interpret and apply the law as I see it. I have just told you how I see it.

I have indicated briefly that I think the Government has failed to offer that satisfactory explanation that is required by Section 2518 and, therefore, pursuant to that section and also pursuant to Section 2515 of Title 18, United States Code, I hold that these tapes must be suppressed as evidence in this case.

Mr. Pugh: Your Honor, as we said before, we had not finished our case and we had indeed planned to—

The Court: I will let you supplement the record with whatever material you like. I believe the Government is entitled to appeal this and I assume that the Government will. I think, in fact, that is the procedure that makes the most sense. That is not why I granted the motion, but if I am wrong, let's find out about it. Let's not find out about it after a six or eight week trial on the merits.

Mr. Pugh: Your Honor, I think, also, in your decision, you might give careful consideration to the fact that the intervals, not to take all three tapes together, and the intervals of time, but to separate them out and to say that one, no matter what it is—

The Court: An argument could be made for that, Mr. Pugh, if I were to ignore the express mandate of this statute. The word "immediately" means exactly that.

Mr. Pugh: Say that indeed if it is a day, that is sufficient.

The Court: Well, we don't have a day here. If we had a day, I might have a look at it, but we don't have a day.

Mr. Pugh: That is what—

The Court: What is the least period of time we have?

Mr. Pugh: Well, according to my calculations, it is really not 13 days. It comes down to 10 days.

The Court: Ten days is not immediate.

Mr. Pugh: I understand that, but I wish you would separate, for appeal purposes, in terms of—

The Court: No, I will just enter one order on all three sets of tapes. I recognize that there is a difference between 45 days and 10 days. On the other hand, looking at those time spans in terms of the Congressional purpose, I see no significant distinction.

Now, if you get down to a day, then we get into the area where you might have a satisfactory explanation.

Mr. Pugh: Well, Your Honor, this is the kind of evidence that I was going to present. Number 1, even considering the fact that there was a weekend involved, unavailability, which knocks it down to 10 days, the 10 day period that we are talking about then is substantially decreased by the fact that the period of the order ran longer than the termination date itself.

The Court: I realize that the time starts to run and I think this probably was an oversight on the part of Congress because to really effectuate its intent, I think the immediate sealing should take place upon the termination of the tap, if that happens to occur sooner than the authorization. But, in any case, we should start counting here as of the termination of the authorization, and that is the way I have looked at the case.

ORAL OPINION OF JUDGE GRADY ON DECEMBER 23, 1976 (Tr. 30-35)

The Court: I think that the matter is by no means free of doubt, but I am going to deny the motion to reconsider, at least in part. I am going to deny the motion to the extent that I will not vacate my order suppressing use of the tapes themselves.

I think that the Government's approach to the sealing requirement is in fundamental opposition to the purpose that Congress had in mind when it enacted that requirement. I will not repeat what I said in my ruling on the motion at the time I originally ruled, but I will point out that in referring the Court to the matter of whether the defendants' constitutional rights have been violated and in referring to the sealing requirement as a technical requirement, the Government persists unreconstructed in its view that actual prejudice must be shown here, and then in the absence of showing of actual prejudice, these are merely technical requirements which may be overlooked. I fail to understand how that view of the statute can be supported.

As I have indicated in my question that I asked of Mr. Pugh today, I do not think any reasonable person could argue that if actual prejudice is shown, then to the extent of that showing, those particular tapes would have to be suppressed. Now, I am not going to presume that Congress had done a vain and unnecessary thing by putting into this statute a specific requirement that the tapes be sealed as soon as possible or immediately, rather, is the word that they used. They would not have to do that unless they meant literally that they should be sealed immediately. Unless they meant what they said in the introductory section

of the statute that unless the statute is complied with fully and in every respect, the tapes cannot be used.

Congress is well aware of the historical and inherent power of a Court to suppress as evidence anything which is tainted, which is unreliable, which has been deliberately tampered with or which has been secured in any unfair manner. It did not need to put a sealing requirement in the statute in order to deal with that kind of situation. So I persist in my view that my duty to enforce the law requires me to suppress these tapes.

Now, I do this very deferentially because it does seem to me that my view of the statute is one which the Court of Appeals in the case of United States against Lawson did not find to be self-evident. Whether they actually considered that approach and rejected it is not clear to me from reading the opinion, and it certainly is not clear from reading the briefs that were submitted in that case. I do know that the argument was not made. The argument that was made by the defendants here to the effect that it is the potential for abuse, which is the evil addressed by the statute, was not advanced in Lawson. It is quite clear that the language of the Court of Appeals does not address that question.

On page 13 of its opinion, the Court says,

> "We do not assign error to the failure to suppress the tap evidence on this ground because appellants have not questioned the integrity of the tapes."

If one reads that language literally, one would infer that the simple act of questioning the integrity, whether or not you can support it by a demonstration of lack of integrity, would be sufficient to invoke the protection of the sealing requirement.

In the very next sentence, the Court goes on to say, "The purpose of the statute to insure the integrity of the tapes thus was accomplished." That is such a categorical statement that I cannot really believe that the Court of Appeals meant to say that it was clear or factual on that record that there had been no violation of the integrity of the tapes.

I think the Court of Appeals is as aware as I am that these tapes can be altered in a way that is not detectable.

So reading the Lawson opinion as a whole, it seems to me that it addressed a question somewhat different than the one that is before me. I have felt it necessary to explain my feeling about the Lawson case because I am quite mindful of my obligation to follow the decisions of the Seventh Circuit Court of Appeals just as I am mindful of my obligation to enforce the statutes of the United States.

I believe that I have done the best I can to perform both of those duties in this case, and it will remain for the Court of Appeals to determine the extent to which I have been successful.

Now, the Government does raise a valid point in its motion to reconsider to the extent that it suggests that suppressing use of the tapes themselves does not require suppression of any evidence derived from the tapes. The sealing requirement has nothing to do with derivative evidence, and Mr. Pugh has offered to submit a draft order, a proposed draft order, that would make clear just what the scope of the suppression is, and I would invite him to do so.

Mr. Pugh: Your Honor, excuse me.

Before we get into that area, there was one other thing that the government failed to say to you in regard to its position on the sealing requirements. Now, under that suppression section that we are talking about, which is the one that is exclusively designed for violations of sealing, your Honor will remember before that we were always focusing on two words, satisfactory explanation.

I think that if your Honor looks at that as a congressional mandate for saying where there is some plausible, plausible reason for delay in sealing, then indeed, suppression is not warranted even under this limited provision.

The Court: I have previously found that the explanation was not satisfactory here, and I continue in that view.

Mr. Pugh: Then your Honor, the Government will submit to you an order that will conform to this Court.

The Court: All right.

I would like to say one more thing. While it is true that I have found that there was no deliberate tampering with the tapes, I have not found and do not mean to imply that in the course of this playing and replaying of the tapes, there might not have been some inadvertent alteration. I have no way of knowing whether there was or not, and I make no finding that such a thing did not occur.

I have no basis for knowing whether it did or did not, and that illustrates, I think the reason that Congress had in mind when it adopted this statutory scheme.

Now, one final item: I did not realize until just before I came on the bench that the defendants had submitted an offer of proof. I have not read it yet.

ORAL OPINION OF JUDGE GRADY ON JANUARY 7, 1977 (Tr. 77-79)

The Court: In my opinion, the proceedings today, simply further confirm the validity of the reasoning which underlies my ruling on the motion to suppress.

We are dealing here with matters of opinion. We have two persons who testified today, who are experts in this field. Their testimony diverges in significant respects. This is the case in every field of scientific endeavor, that I am aware of, that becomes the subject for expert testimony.

The paraphernalia you see about you, in the courtroom, has to do with a patent case I am currently trying where outstanding experts, on both sides of the case, in the field, has to do with a patent case I am currently trying where title is not doctored, have testified to absolutely contradictory, not simply contrary, but contradictory opinions in their field of electronics, on the facts that are before me.

Without casting any aspersions whatsoever on any of the testimony today, basically what it illustrates to me is that we are dealing with an area where it is, at least to some extent, speculative as to what the facts are because you are dealing with matters of opinion.

I think it was in recognition of that situation that Congress incorporated, in the wire tapping legislation, those threshold guarantees with which we are concerned in this proceeding. And, of course, as I have indicated before, I use the word "guarantees" in the skeptical sense that I am sure Congress itself was aware of. There is no guarantee against anything in this life and, certainly, tampering with the product of electronic equipment is no exception.

But, for the Court to adopt your suggestion, Mr. Pugh, and hold that this evidence that I have heard today establishes, as a fact, that there was not even any accidental

alteration of these tapes, first of all, asks me to reach a finding, which I could not reach on the basis of the evidence before me, because I am not so satisfied and, secondly, the fact that you asked me to do that, it seems to me, illustrates the government's continuing refusal to recognize that it is basically unfair to ask a defendant, in this kind of situation, to prove that there has been tampering with the tapes.

I have said again, and I will just say, by way of conclusion, I believe it was the explicit intent of Congress to avoid, as much as is possible, the necessity for conducting hearings of the kind that has been held here today on this question of whether there was any alteration of tapes.

I do not know whether there is any reporting or whether the proceeding before Judge Sirica, I believe it was Judge Sirica in the famous Watergate tape case, found its way into any reports, but, I do recall, as I am sure we all recall, the very extensive hearing that was held before Judge Sirica on the question of whether or not the tapes had been altered, whether the alterations were intentional and, if so, in what manner they were done.

I recall very distinctly, the newspaper accounts of how the distinguished experts, who were marshaled by both sides in that case, came to the same kind of disagreement which is so typical in cases where the parties rely upon expert testimony.

I also recall that Judge Sirica appointed a panel of experts to come to a conclusion on the matter and my recollection fails me somewhat as to what the conclusion was, but it certainly was, by no means, dispositive of the question.

So, the very notion that this matter can be the subject of certitude, is, I think, not borne out either by this record or by human experience in this field.

The motion to reconsider is denied.

APPENDIX 3

OPINION BY JUDGE PELL
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
November 7, 1977

Before
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 77-1152 vs.

DONALD J. ANGELINI, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 76-Cr-169
John F. Grady, *Judge*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, in accordance with the opinion of this court filed this date.

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
November 30, 1977

Before
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 77-1152 vs.

DONALD J. ANGELINI, DOMINIC CORTINA, JOSEPH SPADAVECCHIO, SALVATORE J. MOLOSE, NICK CAMILLO, JOHN LA PLACA, and FRANK AURELI,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 76-Cr-169
John F. Grady, *Judge*.

On consideration of the petition for rehearing filed in the above-entitled cause by Donald J. Angelini, et al., appellees, all of the judges on the original panel having voted to deny the same,

It Is Hereby Ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED

No. 77-938

In the Supreme Court of the United States

OCTOBER TERM, 1977

DONALD J. ANGELINI, DOMINIC CORTINA, JOSEPH SPADAVECCHIO, SALVATORE J. MOLOSE, NICK CAMILLO, JOHN LA PLACA and FRANK AURELI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTARY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the
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OCTOBER TERM, 1977

No. 77-938

DONALD J. ANGELINI, DOMINIC CORTINA, JOSEPH SPADAVECCHIO, SALVATORE J. MOLOSE, NICK CAMILLO, JOHN LA PLACA and FRANK AURELI,
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vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTARY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to Supreme Court Rule 24(5), petitioners wish to call to the attention of the Court a Law Review article which is directly on point in the present case. In *Note, Judicial Sealing Of Tape Recordings Under Title III—A Need For Clarification,* 15 Amer. Crim. Law Rev. 89 (1977), the author discusses cases arising under 18 U.S.C. §2418(8)(a), relating to the sealing requirement, pointing up the conflict among the Circuits and the need for a definitive interpretation of this statute. This volume of the Law Review, published by the American Bar Association Section of Criminal Justice and sent to all members of that section, was not received by petitioners' counsel until after the filing of the Petition for Certiorari in this case, and thus was not cited in our original petition.

In the above-cited article, the author points out the need for judicial clarification of the terms "immediately" and "satisfactory explanation" as used in §2518(8)(a), as well as the need for determination of the appropriate sanction for failure to seal tapes in accordance with the statute. The author concludes that the analysis of the Third Circuit in *United States* v. *Falcone,* 505 F.2d 478 (3d Cir. 1974), *cert. denied,* 420 U.S. 955, which is similar to the view expressed by the Seventh Circuit in this case, renders the sealing provisions of §2518(8)(a) virtually useless, and, as argued by petitioners in the present case, suggests that the analysis of the Second Circuit in *United States* v. *Gigante,* 538 F.2d 502 (2d Cir. 1976), should be adopted.

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January 6, 1978

No. 77-938

In the Supreme Court of the United States

OCTOBER TERM, 1977

DONALD J. ANGELINI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 565 F. 2d 469.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22) was entered on November 7, 1977. A petition for rehearing was denied on November 30, 1977 (Pet. App. 23). The petition for a writ of certiorari was filed on December 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a satisfactory explanation existed in this case for delays of between 9 and 38 days in sealing the recordings of court-authorized wire interceptions of petitioners' conversations.

STATUTE INVOLVED

18 U.S.C. 2518(8)(a) provides:

> The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

STATEMENT

In a three-count indictment returned in February 1976 in the Northern District of Illinois, petitioners were charged with operating an illegal gambling business,

grossing more than $1.2 million per month, in violation of 18 U.S.C. (and Supp. V) 1955, conducting that illegal enterprise through the collection of unlawful debts, in violation of 18 U.S.C. 1962(c), and conspiring to violate 18 U.S.C. 1962(c), in violation of 18 U.S.C. 1962(d). The district court granted petitioners' motion to suppress recordings of telephone conversations monitored pursuant to three court-ordered wire interceptions on the ground that the government had failed to comply with the sealing requirement of 18 U.S.C. 2518(8)(a).

The court of appeals reversed the suppression order and remanded the case for further proceedings (Pet. App. 1-10).

1. The first court order, authorizing electronic surveillance for a period of 20 days, was entered on November 25, 1974, and the interceptions were terminated on December 10, 1974 (C.A. App. 26, 179-181).[1] The tapes were sealed under the direction of the court on December 24, 1974 (C.A. App. 32), nine days after the authorized period of interception expired. On December 31, 1974, a second order authorizing surveillance for 20 days (until January 20, 1975) was entered. The interceptions were terminated on January 15, 1975, and the tapes were sealed on February 27, 1975 (C.A. App. 99-102), 38 days after expiration of the authorized period of interception. The third order, also authorizing surveillance for 20 days, was entered on January 13, 1975, and the interceptions were terminated on January 15, 1975. The tapes were sealed on February 28, 1975 (C.A. App. 101-102), 26 days after the authorized interception period expired (on February 2).

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[1] "C.A. App." refers to the government's appendix in the court of appeals, a copy of which we are lodging with the Court.

In each case the sealing of the tapes was delayed until transcripts of the intercepted conversations were completed (C.A. App. 15-18).[2] The transcripts were made primarily from duplicate tapes;[3] but the originals were retained, in a locked filing cabinet in an area to which access was limited,[4] for reference when the duplicates were difficult to understand (C.A. App. 15-18). When one of the six secretaries who worked full time typing the transcripts was unable to make out a portion of one of the tapes, she would type the word "inaudible" (C.A. App. 30-31). In attempting to fill in the inaudible segments, the supervising agent would refer first to the duplicate tape, and then, if necessary, to the original (C.A. App. 31).[5] The duplicates were generally given to the typists on the

[2]The procedure followed in transcribing the taped conversations was described in detail by the FBI agent who supervised the surveillance conducted pursuant to the first court order (C.A. App. 26-34). The supervising agent for the interceptions conducted pursuant to the second and third court orders testified that the procedure he followed was the same as that followed with respect to the earlier interceptions (C.A. App. 104-105).

[3]The tapes for each day were duplicated the following morning because the equipment used could not produce more than one original (C.A. App. 29).

[4]Only the FBI agent supervising the interceptions had a key to the filing cabinet in which the original tapes were housed (C.A. App. 28). The tapes were never removed from the cabinet by anyone other than the supervising agent (C.A. App. 33), and there was no indication of tampering with the tapes or the filing cabinet (C.A. App. 33, 109).

[5]The agent who supervised interceptions pursuant to the first court order testified that he had referred to the original tapes between 10 and 15 times and that on some of those occasions he had been able to make out portions of conversations that were inaudible on the duplicate tape (C.A. App. 32). The agent who supervised interceptions pursuant to the second and third court orders testified that he had referred to the originals between seven and ten times (C.A. App. 106).

day following the interceptions, and the transcripts were generally completed four or five days later (C.A. App. 116, 118). The three interceptions generated more than 4,000 pages of transcript—1,013 pages for the first interception period, 3,182 pages for the second, and 186 pages for the third (C.A. App. 187-188).

2. The district court found that there had been no deliberate tampering with the tapes, and that the government attorneys and agents had acted in good faith and with no intent to circumvent the statutory sealing requirement (C.A. App. 175). The court held, however, that suppression was warranted because the number of tape segments that reference to the original could have clarified was an "infinitesimal percentage" of the total. On this basis, it concluded that the delays in sealing had not been "satisfactorily explained," as Section 2518(8)(a) requires (C.A. App. 162-163).[6]

3. The court of appeals reversed, "because the Government's explanation is, in the circumstances of this case, satisfactory, and because the purposes intended by Congress were fulfilled despite the delay" (Pet. App. 5). In discussing the explanation for the delay, the court noted that "each case * * * must be judged in the context of its own facts" (Pet. App. 7); here, the fact that the delay occurred before the requirements of Section 2518(8)(a) were judicially clarified was particularly significant (*ibid.*).

[6]In the course of proceedings on the government's motion to reconsider the suppression ruling, the parties offered evidence concerning the possibility that there had been inadvertent alterations of the original tapes (see C.A. App. 221-228, 292-302). In reaffirming the suppression order, the district court declined to make a finding as to whether such alterations had occurred, on the ground that the purpose of the sealing requirement was to eliminate the need for inquiries into the possibility of actual alterations (C.A. App. 316).

The statutory purpose of assuring the integrity of the tapes was satisfied here by the district court's unchallenged finding that there had been no intentional tampering with the tapes, and by the testimony that showed conclusively that, had any inadvertent alterations occurred, they would have been readily detectable. Accordingly, the court held that there was no need to suppress all the tapes to protect the integrity of the evidence received at trial (Pet. App. 8-10).

ARGUMENT

1. This petition challenges the court of appeals' reversal of the district court's pretrial suppression order. That reversal puts petitioners in the same position as if the district court had ruled against them in the first instance; such a ruling would not have been subject to interlocutory appeal. See *Cobbledick* v. *United States*, 309 U.S. 323. There is similarly no justification for this Court to grant interlocutory review under the present circumstances. Three years have elapsed since the indictment was returned, and petitioners have not yet been brought to trial. Review by this Court at this time would further postpone trial by as much as a year. Moreover, review now by this Court is premature, since at trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, any of the petitioners are convicted and the convictions are affirmed, they will then be able to present to this Court at one time both their contentions relating to the reversal of the suppression order and any objections they may have to the conduct of the trial.

2. In any event, the decision of the court of appeals is correct and presents no issue requiring review by this Court. The requirement in 18 U.S.C. 2518(8)(a) that recordings of intercepted conversations must be sealed

immediately is qualified by the provision excusing the absence of a seal—and, *a fortiori*, a delay in sealing—where a "satisfactory explanation" is offered. The determination of the court of appeals that the government's explanation for the delays in sealing was "satisfactory"—a determination which, as the court recognized (Pet. App. 6-7), is primarily factual—is consistent with the manner in which other circuits have applied the sealing requirement of 18 U.S.C. 2518(8)(a) in cases involving similar delays.[7]

The Fifth Circuit has upheld a five-day delay in sealing, during which time the tape recordings were transcribed (*United States* v. *Cohen*, 530 F. 2d 43 (C.A. 5), certiorari denied, 429 U.S. 855), and a 14-day delay where "[t]he government accounted for the delay by showing that the recordings remained in the FBI evidence room for seven days and that the additional seven days were used in the preparation of search warrants" (*United States* v.

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[7]Petitioners incorrectly suggest (Pet. App. 15) that there were substantial unexplained delays in sealing after the transcripts of the duplicate tapes were completed. But while the transcripts of the duplicate tapes were generally available four or five days after the tapes were made, that was not the end of the transcription process, for the supervising FBI agent still had to listen to the tapes and attempt to fill in the portions a secretary had found inaudible. Although it is not clear from the record when the latter process was completed as to each set of tapes, we submit that in light of the total length of the transcripts—more than 4,000 pages—the delays in this case were not unreasonable. The delay in sealing the third set of tapes, which yielded only 186 pages of transcript, was primarily because the tapes were transcribed chronologically (C.A. App. 206).

The court of appeals properly rejected the district court's reliance on the small number of references actually made to the original tapes because there was "no reason to assume that the relatively light use of the tapes could have been predicted in advance" (Pet. App. 8 n.6).

Sklaroff, 506 F. 2d 837, 840 (C.A. 5), certiorari denied, 423 U.S. 874). The Second Circuit has upheld a seven-day sealing delay that was primarily the result of the government attorney's preparations for trial (*United States* v. *Scafidi*, 564 F. 2d 633, 641 (C.A. 2), petitions for a writ of certiorari pending, Nos. 77-1001, 77-1002, 77-1003, 77-6035, 77-6165), and six and thirteen day delays caused by efforts to have the issuing judge, instead of another judge, seal the tapes (*United States* v. *Fury*, 554 F. 2d 522, 533 (C.A. 2), petition for a writ of certiorari pending, No. 76-6828; *United States* v. *Poeta*, 455 F. 2d 117 (C.A. 2), certiorari denied, 406 U.S. 948).[8]

These decisions recognize, as did the court of appeals in this case, that immediate sealing is preferable because it eliminates any doubt about the tapes' integrity and eliminates the need for an inquiry by the court, but that the proper procedure when the tapes are not immediately sealed is to require the government, as a condition of the admissibility of the tapes, to demonstrate that it has used reasonable procedures and has preserved the integrity of the tapes, so that the purpose of the immediate sealing requirement has been accomplished.[9]

The foregoing cases demonstrate that petitioners' claims of inter-circuit conflicts in the interpretation of 18 U.S.C. 2518(8)(a) are exaggerated. The court of appeals properly

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[8]The interceptions involved in *Fury* and *Poeta* were conducted pursuant to New York law. The sealing requirement of the state statute does not differ materially from that of 18 U.S.C. 2518(8)(a). See *United States* v. *Fury*, *supra*, 554 F. 2d at 533; see also 18 U.S.C. 2516(2).

[9]Petitioners incorrectly claim (Pet. 7) that the court of appeals placed upon them the burden of proving "actual prejudice"—presumably, alteration of the tapes. Instead, the court found (Pet. App. 9) that "whichever side has the burden of persuasion, the Government's proof persuades in this case."

distinguished (Pet. App. 5) *United States* v. *Gigante*, 538 F. 2d 502 (C.A. 2), in which the delays in sealing ranged from eight months to more than a year, the government offered "no explanation whatsoever" for the delays (538 F. 2d at 504), and "haphazard procedures" were followed in handling the tapes (*id.* at 505). There can be little doubt that, if confronted with similar circumstances, the panel that decided this case would, like the court in *Gigante*, have held that suppression was proper. Conversely, in light of the Second Circuit's decisions in *Scafidi*, *Fury*, and *Poeta*, *supra*, it is not at all clear that the result in this case would have been different in the Second Circuit.[10]

In sum, where, as here, delays in sealing tape recordings of intercepted conversations are reasonable in purpose and in time, and the government has taken care to protect the integrity of the tapes, the courts of appeals have uniformly held that suppression of evidence is not

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[10]As petitioners point out (Pet. 11), there does appear to be some divergence of opinion among the circuits as to the interplay of the sealing requirement of 18 U.S.C. 2518(8)(a) and the suppression provisions of 18 U.S.C. 2518(10)(a). In *United States* v. *Gigante*, *supra*, 538 F. 2d at 506, the Second Circuit criticized the Third Circuit's decision in *United States* v. *Falcone*, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955, because it "focused primarily upon the suppression provisions of §2518(10)(a), and paid scant attention to the independent prerequisities for admissibility delineated in §2518(8)(a)." The Seventh Circuit has expressed the view that the two provisions must be read together (Pet. App. 5). In any event, this case does not present the question whether Section 2518(10)(a) qualifies Section 2518(8)(a) with respect to the use of the recordings as evidence following a delay in sealing, because here the court of appeals found that the government's explanation for the delay was satisfactory. There was thus no violation of Section 2518(8)(a); accordingly, suppression is not required by that section, and the applicability of Section 2518(10)(a) is not in issue.

warranted.[11] Since there is no material disagreement regarding the applicable legal principles, little purpose would be served by this Court undertaking to review the Seventh Circuit's holding that the delay in sealing here was satisfactorily explained.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1978.

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[11]In addition, we note that this issue is not likely to be of continuing importance. As we informed the Court in our brief in opposition in *Falcone* v. *United States*, Nos. 74-5500 and 74-5619, the Department of Justice has instituted special procedures to remind officials responsible for federal interceptions of their obligation to present tapes promptly for sealing. These procedures were instituted in February 1975, approximately contemporaneously with the processing of the tapes in this case.

[12]This is particularly true in light of the indication that, now that the sealing requirements have been judicially clarified, future cases may be judged by more stringent standards. See Pet. App. 7.

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